



COASTAL STATES ORGANIZATION

FOUNDED IN 1970 TO REPRESENT THE GOVERNORS OF THE THIRTY-FIVE COASTAL STATES, TERRITORIES, AND COMMONWEALTHS ON COASTAL, GREAT LAKES, AND OCEAN AFFAIRS.

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October 3, 2002

David Kaiser
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Coastal Programs Division
Office of Ocean and Coastal Resource Management/NOAA
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910

Attention: Federal Consistency Energy Review Comments

Dear Mr. Kaiser:

I have attached the comments of the Coastal States Organization (CSO) on the Advance Notice of Proposed Rulemaking (ANPR) on Procedural Changes to the Federal Consistency Process (Federal Register, July 2, 2002, p. 44407. CSO represents coastal states and territories along the coasts of the Atlantic, Pacific, Gulf and Great Lakes in promoting their common interests in improved coastal management.

CSO does not believe that changes to the CZMA consistency regulations are justified at this time. As the ANPR recognizes, the consistency regulations were revised less than two years ago following a rulemaking process that included extensive stakeholder review and comment. The ANPR refers to findings within the Energy Report of the lack of clearly defined requirements and information needs, and uncertain deadlines for completing the procedures of the CZMA and OCSLA. There are no allegations in the ANPR of specific problems being experienced since the recent rule revisions, and there has not been sufficient time to assess the effectiveness of the improvements to the consistency regulations in addressing the general concerns noted in the Energy Report.

Although the ANPR is described as initiating a process to evaluate "limited and specific procedural changes or guidance" to the CZMA consistency regulations, the scope of the ANPR is unclear and open-ended. Given the lack of specificity in the ANPR as to what problems are to be addressed and how so, there is a danger, if not likelihood, that in "solving" perceived problems, multiple inadvertent problems will result.

CSO suggests that NOAA and MMS work with states and federal agencies to resolve local uncertainties or disagreements in the application of the consistency regulations through memorandums of understanding and other guidance.

If NOAA is intent on going forward with rule revisions, any changes must not shift responsibilities or create a disadvantage to states. Any tinkering with the consistency provisions holds the potential to upset the balance that Congress intended to provide better management of our coasts through the CZMA.



We are committed to working with NOAA, MMS and other stakeholders to resolve perceived problems with the implementation of the consistency regulations, and look forward to doing so at the earliest opportunity.

Thank you for consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Kerry Kehoe", with a long horizontal flourish extending to the right.

R. Kerry Kehoe
Counsel
Coastal States Organization

Attention:

October 3, 2002

David Kaiser
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Coastal Programs Division
Office of Ocean and Coastal Resource Management/NOAA
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Comments of the Coastal States Organization

In Re: Advance Notice of Proposed Rulemaking

Federal Consistency Energy Review Comments

Federal Register, Vol 67, No. 127, July 2, 2002

General Comments

On the Integrated Relationship of the CZMA and OCSLA

Given that the Advance Notice of Proposed Rulemaking is premised on a perceived conflict between the *Coastal Zone Management Act* (CZMA) and *Outer Continental Shelf Lands Act* (OCSLA), we note at the outset that there is no problem with the statutory construction of the consistency provisions of the CZMA or their relation to the OCSLA. Nor can it be said that Congress inadvertently failed to integrate the CZMA and OCSLA. To the contrary, Congress has expressly recognized the OCSLA within the CZMA,¹ and the requirements for state CZMA consistency reviews within the OCSLA.² In the 30 years since the enactment of the CZMA, Congress has held numerous oversight and legislative hearings on the statute and its implementation. In that time, Congress has seen the need to broaden, not narrow, the scope of state consistency reviews.

The title of section 307 of the CZMA – “Coordination and Cooperation” is not a misnomer. As the ANPR acknowledges, conflict has not been the norm for consistency reviews.³ Rather than fostering conflict, the CZMA has provided a process for states, federal agencies and applicants to identify and work through potential problems before substantial resources are committed and potentially wasted. We recognize that over the past twenty some years the CZMA consistency provisions occasionally have been a focal point for a few controversies – some of which involved offshore oil and gas development. But it is a mistake to conclude that the consistency provisions were the source of these controversies. It

¹16 U.S.C. §1456(c)(3)(B).

²43 U.S.C. §1351(d) State concurrence in land or water zone use in coastal zone of State; 43 U.S.C. 1351(h) Approval, disapproval or modification of plan; reapplication; periodic review.

³“While States have negotiated changes to thousands of federal permits over the years, States have concurred with approximately 93% of all federal actions reviewed.” Procedural Changes to the Federal Consistency Process, 67 Fed. Reg. 127, p. 44407, at p. 44408 (July 2, 2000); “Since 1978, MMS has approved over 10,600 Eps and over 6,000 DPPs. States have concurred with nearly all of these plans.” *Id.* at p. 44409.

was the projects themselves that were controversial. The CZMA consistency provisions provided a channel to process these controversies avoiding resolution through litigation and/or ad hoc legislative intervention.

The CZMA consistency requirements have improved efficiencies for oil and gas exploration, development and transport. For example, Alaska uses a memorandum of understanding with the Minerals Management Service to facilitate CZMA reviews of OCS activities. North Carolina amended its CZMA program to facilitate energy project reviews by clearly identifying information needs which will avoid delays and be more predictable. Texas has developed a general CZMA concurrence for its review of OCS oil and gas exploration plans. Maine and New Hampshire used the CZMA consistency review process to approve natural gas pipelines from Nova Scotia.

Caution Against Identifying a Solution Before Knowing the Problem

The introduction to the December 2000 revisions CZMA consistency regulations states:

This final rule is also the result of a two-year informal effort by NOAA to work with Federal agencies, State agencies, and other interested parties to identify issues and obtain comments on draft proposed revisions to the regulations. Thus, this final rule has already undergone substantial review and modification by Federal agencies, State agencies and other interested parties.⁴

Although the Advance Notice of Proposed Rulemaking (ANPR) is described as initiating a process to evaluate "limited and specific procedural changes or guidance" to the CZMA consistency regulations, the scope of the ANPR is unclear and open-ended. It is written in an oblique and contradictory manner.

There are no allegations in the ANPR of specific problems being experienced since the recent rule revisions. The ANPR refers to findings within the Energy Report of the lack of clearly defined requirements and information needs from federal and state entities, and uncertain deadlines for completing the procedures of the CZMA and OCSLA.⁵ Given that the Energy Report was issued only five months after the final rule promulgating the revisions to the consistency regulations, and that the ANPR was published only 18 months after the final rule, there has not been sufficient time to assess the effectiveness of the improvements to the consistency regulations.

Neither the experience of the states nor information provided in the ANPR indicates a problem of a general nature that requires a rule change. Problems that have been experienced are more often than not a result of agencies or applicants being unfamiliar with the CZMA consistency requirements and their failure to fully adhere to those requirements. Making changes to the consistency regulations will yield little benefit if federal agencies do not have a good foundation in the CZMA consistency requirements.

⁴ Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 2237, p. 77124, at p. 77125 (December 8, 2000).

⁵ Procedural Changes to the Federal Consistency Process, 67 Fed. Reg. 127, p. 44407, at p. 44408 (July 2, 2002) citing the Report of the National Energy Policy Group, at 5-7, ISBN D-16-050814-2 (May 2001); <<http://www.whitehouse.gov/energy>>.

To foster greater attention by federal agencies and permit applicants to the consistency requirements, more resources are needed to be dedicated within the NOAA Office of Ocean and Coastal Resource Management and the NOAA Office of General Counsel to assist agencies and applicants with understanding their consistency responsibilities.

Rather than attempt to solve problems through changes to the regulations, when no problems of a general nature have been demonstrated, CSO suggests that NOAA and MMS work with states and federal agencies to resolve local uncertainties or disagreements in the application of the consistency regulations through memorandums of understanding or other guidance.

In the absence of the presentation in the ANPR of a need to revisit the CZMA consistency regulations, CSO does not recommend changes at this time.

An underlying presumption of the ANPR is that there are readily available clear-cut solutions to the obscure problems presented in the ANPR. CSO does not agree. Given the lack of specificity in the ANPR as to what problems are to be addressed and how so, there is a danger, if not likelihood, that in "solving" perceived problems, multiple unforeseen problems will be created. For example, although the ANPR discussion is largely in the context of OCS permit activities, the notice clearly anticipates potential changes that would go far beyond OCS permit activities in that it references provisions in the regulations that are outside of Subpart E. For instance, the ANPR specifically references sections 930.58 (Necessary Data and Information) and 930.53 (Listed Federal license or permit activities).

Assuming that a case could be made for substantial problems with the consistency regulations, CSO does not rule out consideration of proposed improvements to the consistency process; however, any changes must not shift responsibilities or create a disadvantage to states. Any tinkering with the consistency provisions holds the potential to upset the balance that Congress intended to provide better management of our coasts through the CZMA. NOAA is cautioned against making any changes which might upset this balance whether they are intended or inadvertent.

Prior to proceeding any further with a proposed rulemaking, NOAA should bring together stakeholders in a constructive discussion of perceived problems with the consistency process, how those problems might be addressed, and what the impacts of changes might be.

Responses to the Questions in the ANPR

1. *Whether NOAA needs to further describe the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements.*

States do coordinate with federal agencies and applicants on information needs, particularly in regards to OCS activities. The type of information needs vary among states due to their differences in geography, climate, coastal uses, and federally approved enforceable CZM policies. Information and data needs of individual states also vary depending on the complexity of a project. The use of new technology or use

of existing technology in a different environment can lead to unforeseen information needs.⁶ This is particularly true in regards to offshore energy exploration and production where new technology is raising the potential for producing in ever deeper waters and other difficult environments, and large scale alternative energy sources such as offshore wind and wave electricity generation are being proposed for the first time.

For some state and OCSLA data and information needs, the difference may not be in what is required but its specificity. What specificity will be necessary to meet data and information requirements will vary with the nature and potential impact of an activity, purpose and scope of the enforceable policies of individual states, and new information on impacts which is frequently coming to light. Trying to identify or specify data and information requirements through the Code of Federal Regulations would be inefficient, impractical and unwise.

Instances where there have been difficulties in satisfying necessary data and information needs are the rare exception. Where there have been problems, the proper remedy is the development of guidance or memorandums of understanding between the state and federal agencies on coordinating information requirements. This would be far more effective than trying to create a broad fix to isolated problems. The potential adverse consequences of too narrowly defining data and information needs might far outweigh whatever perceived inconveniences there may be with the existing requirements.

Industry representatives have previously proposed limiting the necessary data and information requirements to those required under the OCSLA. The rationale for this proposal is the assumption that the broad requirements under the OCSLA cover all information that a state might request. CSO does not agree with the assumption. Most of the OCSLA requirements ask for fairly specific descriptions, as opposed to the environmental analysis which states need for consistency reviews.

Even if the CZMA and OCSLA data and information requirements were essentially identical, the discretion of states in identifying necessary data and information must be preserved. A consequence of limiting reviews to information required in accordance with the OCSLA would be that states would no longer be in a position to define their own information requirements to meet the particular needs of their enforceable policies. States would have no assurance that the details of the submissions for Exploration and Development and Production Plans required under the OCSLA regulations might change with changes to the OCSLA regulations.

It should also be noted that neither the question presented nor the ANPR recognizes that there is a distinction between information that a state requires as necessary data and information to trigger the consistency review process, and information that is subsequently requested once the process has begun.⁷ It is likely that the distinction has also been lost on those who complain about state data and information requests. State consistency reviews do not begin until all specified necessary data and information has been submitted. Once submitted the clock begins to run on the six-month review window. A state may

⁶See October 2, 2002 comments submitted by Kerry Howard for the State of Alaska in regards to the construction of deep water drilling platforms in areas of extreme ice hazards, p. 3.

⁷See Procedural Changes to the Federal Consistency Process, 67 Fed. Reg. 127, p. 44407, at p. 44410 (July 2, 2000)

continue to request data and information even if late in the review period to aid in reaching a decision on the consistency certification but this does not postpone the time in which a state must reach a decision. The realization of the need for additional information might be for any number of reasons. One in particular may be issues raised during the public participation in the consistency review process that Congress mandated in the 1990 amendments to the CZMA.⁸

2. *Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)(A), (B) and 307(d) can be established taking into consideration the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards.*

Although the ANPR and Energy Report allege delays in the Secretarial appeals process, neither presents any basis for the allegation, nor does either attribute any cause for the alleged delays.

Between 1983 and 2001, there were 38 appeals decided by the Secretary.⁹ The average length of time for offshore oil and gas appeals has not been longer than that for other activities. The mean average length of time for concluding appeals was 25 months. For appeals involving OCS activities, the mean average for the length of appeals was 15 months with a range from 7-50 months.¹⁰

Most of the time spent on appeals is for development of the record with the submission of briefs, replies and supporting information by the parties. The length of time to develop the record is largely determined by the parties as the Secretary ordinarily grants motions to reply and submit additional or rebuttal information. The reason that development of the record may be lengthy is because an appeal to the Secretary is not only a *de novo* review, it is a decision whose basis is an entirely different standard from that of a state objection. Whereas, a state decision is based upon a review of consistency with state enforceable policies, the decision of the Secretary is based on fact specific assessments of whether there are national interests involved which are furthered in a significant or substantial manner by the proposed activity; whether the national interest outweighs the adverse impacts of an activity; and whether there are available alternatives to allow the activity to go forward in a manner which is consistent with the state's enforceable policies.¹¹

As there already is a statutorily mandated time frame to reach a decision once an appeal record is completed – 90 days with a 45-day extension allowed¹² – the only way to shorten the time frame for appeals would be to have a fixed cutoff date for the development of the record once an appeal is filed. This would be ill-advised as it would deny the Secretary from having the best available information to

⁸Coastal Zone Management Act of 1972, as amended, Sec. 306 (d)(14); 16 U.S.C. §1455 (d)(14). Incorporated in the consistency regulations at 15 CFR 930.2.

⁹U.S. DEPARTMENT OF COMMERCE, NOAA, *Federal Consistency Requirements*, Appendix D, Nov. 2001.

¹⁰Based on a CSO analysis of information supplied in Appendix D cited above.

¹¹15 CFR 930.121

¹²Coastal Zone Management Act of 1972, as amended, Sec. 319; 16 U.S.C. §1465.

make a decision. It would also place the states at a disadvantage in that a state is always the appellee in a consistency appeal and in the position of responding to new information supplied by the appellant. As noted in the *Federal Register* "Discussion of the Final Changes in the December 2000 Final Rule" revising the consistency regulations, "Increasingly, appeals to the Secretary result in the development of extensive administrative records containing information never reviewed by the State agency."¹³

A more adverse consequence of putting a strict timeframe for the overall length of an appeal is that it would discourage the resolution of appeals by negotiation. Many rejected applicants file appeals to conform with the regulatory requirement that appeals be filed within 30-days of a state objection. The appeal serves as a placeholder preserving the appellant's rights while at the same time the state and applicant negotiate a resolution to the objection. More often than not, an applicant and state reach an agreement which allows an activity to go forward. The Secretarial appeal process is not blind to these negotiations and recognizes the advantages to both parties and the Department of Commerce in having a negotiated resolution of an objection. A fixed timeframe will remove the timeframe flexibility needed for negotiations, forcing the parties to go forward with an appeal at substantial cost to both, and distracting the parties from resolution while they prepare for Secretarial adjudication.

3. *Whether there is a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA.*

The CZMA consistency review and OCSLA review requirements have existed side by side for more than 20 years. While the statutes and regulations have differing and independent review timeframes, the federal and state agencies involved have by and large exercised their responsibilities in conformance with each other.

The lynchpin for environmental reviews is the process established under the *National Environmental Policy Act* (NEPA). In practice, both federal and state agencies rely, at least in part, on the Environmental Assessments or Environmental Impact Statements developed under NEPA. The CZMA consistency regulations expressly encourage federal agencies to utilize NEPA documents to satisfy CZMA necessary data and information requirements.¹⁴ The use of NEPA documents for meeting state consistency review requirements has been shown to improve the efficiency of the review process for all parties. Some states specifically reference the submission of NEPA documents as part of their necessary data and information requirements. While there may be instances where the processes have been incongruous, this is due to the fact that the agencies chose to make them so not because the consistency regulations prevented them cooperating and coordinating in fulfillment of the purpose of section 307 of the CZMA.

The answer to improving coordination does not lie in revisions to the CZMA consistency regulations. Coordination is best accomplished through the interaction of individual states and federal agencies and

¹³ Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 2237, p. 77124, at p. 77151 (December 8, 2000).

¹⁴ 15 CFR 930.37.

this is what the CZMA consistency regulations recognize and encourage. There are many excellent examples of processes which can serve as models for enhanced state and federal coordination.¹⁵

4. *Whether a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," 15 C.F.R. 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, would improve the efficiency of the Federal consistency process.*

Nothing in the ANPR provides any context for the question presented. There is no discussion whatsoever in the ANPR of a need for the establishment of a "general negative determination," or of a type of activity which might be suitable for a "general negative determination."

A negative determination precludes state consistency review as it is a finding of no coastal effects for state listed activities that would otherwise be subject to state consistency review. A negative determination is a fact specific determination. A "general negative determination" is inappropriate in that it would categorically determine that certain activities have no coastal effects at any time or in any place which presumes that among the universe of foreseen and unforeseen variables the same conclusion will be reached. There is a great risk that agencies would issue "general negative determinations" without regard to the cumulative impacts of activities. The only recourse for a state agency when presented with a negative determination which it disagrees with is to request mediation or file litigation. Given the potential for misapplication of a general negative determination, CSO does not support its establishment.

5. *Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the "listing" and "geographic location" descriptions in 15 C.F.R. 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.*

The comments submitted by the California Coastal Commission provide numerous examples of proposed activities far offshore the coast that had great potential to affect the State.¹⁶ It should be clear from those examples that considerable flexibility is needed in the consistency process to ensure that unanticipated activities with far reaching effects are subject to consistency review.

The regulations are already clear as to how the effects test is to be interpreted;¹⁷ how notice of subject activities is to be provided through listing;¹⁸ and how unlisted activities having coastal effects are to be

¹⁵E.g., see Comments of the California Coastal Commission at p. 8.

¹⁶See Comments of the California Coastal Commission at p. 11.

¹⁷15 C.F.R. 930.11 (g) and 930.33.

¹⁸15 C.F.R. 930.34, 930.53, 930.154.

considered. Under the consistency regulations, the NOAA Office of Ocean and Coastal Resource Management determines the applicability of the consistency provisions to activities far offshore outside the boundaries of review that have been recognized for a state.¹⁹ Regulatory revisions are not needed, nor does additional guidance appear to be necessary.

6. *Whether multiple federal approvals needed for an OCS EP or DPP should be or can be consolidated into a single consistency review. For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not "described in detail" in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP.*

The question is not whether multiple federal approvals should or can be consolidated into a single consistency review as the consistency regulations already allow for consolidation.²⁰ The apparent question underlying that posed is whether such consolidations should be mandated. Such a requirement would be inconsistent with the CZMA. As noted throughout these comments, the requirements of the CZMA are independent of other federal requirements.

¹⁹See 15 CFR 930.54(c).

²⁰15 C.F.R. 930.81.